

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

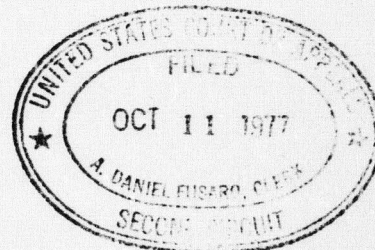
To be argued by
VICTOR L. BRIZEL
(15 minutes)

77-1299

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1299

UNITED STATES OF AMERICA,
Appellee,
-against-
ESAU SOLONE,
Appellant.



BRIEF FOR APPELLANT ESAU SOLONE

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FRO THE SOUTHERN
DISTRICT OF NEW YORK

VICTOR L. BRIZEL, ESQ.
Attorney for Appellant
79 Madison Avenue
New York, N. Y. 10016
(212) 684-6088

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
ISSUES PRESENTED FOR REVIEW	3
THE TRIAL	4
ARGUMENTS	6
POINT ONE: EVIDENCE AS TO UNCHARGED PRIOR AND SUBSEQUENT NARCOTIC TRANSACTIONS, ACTIVITIES AND ASSOCIATIONS WERE CUMULATIVELY PREJUDICIAL AND A NEW TRIAL SHOULD BE ORDERED	6
POINT TWO, AND POINT THREE: THE GOVERNMENT DID NOT MEET ITS BURDEN OF ESTABLISHING DISPOSITION AND OF PROVING APPELLANT GUILTY BEYOND A REASONABLE DOUBT.	9
POINT FOUR: THE COURT'S CHARGE AS TO DEFENDANT'S SELF-INTEREST AS A WITNESS WAS PREJUDICIAL	11
POINT FIVE: THE COURT'S CHARGE AS TO ENTRAPMENT WAS ERRONEOUS	12
POINT SIX: THE COURT'S CHARGE AS TO CONSIDERATION OF UNCHARGED ACTS IS PREJUDICIAL	14
CONCLUSION:	14

TABLE OF CASES AND AUTHORITIES

	<u>Page</u>
United States v. Adams, 385 F. 2d 548 (1967, 2d Circ.)	7
United States v. Byrd, 352 F. 2d 570 (1965, 2d Circ.)	7
United States v. Bueno, 447 F. 2d 903 (1971, 5th Circ.)	10
United States v. Cavallaro, 553 F. 2d 300 (1977, 2d Circ.)	8,9
State v. Goebel, 36 Wash. 2d, 367, 379, 218 P. 2d 300, 306 (1950)	8
Hampton v. United States, 425 U. S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113	11
United States v. Mahler, 363 F. 2d, 673 (1960, 2d Circ.)	12
United States v. Pierce, 414 F. 2d, 163 (1969, 5th Circ.)	13
United States v. Provoo, 215 F. 2d, 531, 537 (1954, 2nd Circ.)	8
United States v. Russell, 411 U. S. 423, 93 S. Ct. 1037, 36 L. Ed. 365 (1973)	11, 13
United States v. Simmons, 503 F. 2d, 831	8,9
Shepard v. United States, 290 U.S. 96, 104, 54 S. Ct. 22, 78 L.Ed. 196, (1933)	8
Sherman v. United States, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 848 (1958)	11
United States v. Silver, 457 F. 2d 1217	10
United States v. Smith, 283 F. 2d 760 (1960, 2d Circ.)	7

	<u>Page</u>
Sorrells v. United States, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932)	11
United States v. Tolkow, 532 F. 2d, 853 (1976, 2d Circ.)	12
United States v. Tate, 554, F. 2d, 1341 (1977, 5th Circ.)	11,13
United States v. Townsend, 555, F. 2d, 152 (1977, 7th Circ.)	9,10
United States v. West, 511 F. 2d, 1083 (1975, 3rd Circ.)	10
United States v. Leonard, 524 F. 2d, 1076 (1975, 2nd Circ.)	8

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

ESAU SOLONE,

Appellant.

APPELLANT'S BRIEF

Preliminary Statement

The appellant, ESAU SOLONE, appeals from the terms of a judgment of conviction rendered in the United States District Court for the Southern District of New York, on the 27th day of May, 1977, which adjudged him guilty under the three counts of indictment no. 77Cr.62 and sentenced him to a term of four years imprisonment on each of said counts, said sentences to run concurrently with each other, to be followed by a special parole of three years.

Count One charges a conspiracy on the part of the appellant, ESAU SOLONE, with PAUL SULLIVAN and

others to the Grand Jury unknown to violate the Narcotic Laws of the United States by selling heroin- (21U.S.C.812, 841[a][1] and 841 [b][1][A].

Counts Two and Three charge Mr. Solone with the sale and possession of 67.8 grams of heroin on April 27, 1976 and of 141.5 grams of heroin on June 23, 1976 in violation of 21 U.S.C.812, 841[a][1], 841[b][1][A], and 18 U.S.C. §2.

The appellant, ESAU SOLONE, was tried alone and is presently incarcerated at the Danbury, Connecticut Federal Prison.

The appellant, ESAU SOLONE, was tried in the United States District Court for the Southern District of New York before the Honorable Charles H. Tenney, United States District Judge, and a jury.

ISSUES PRESENTED FOR REVIEW

1. Was evidence as to uncharged prior and subsequent narcotic transactions, activities and associations cumulatively prejudicial?

2. Did the Government meet its burden of establishing disposition on the part of the appellant?

3. Did the Government as a matter of law, prove the appellant guilty beyond a reasonable doubt?

4. Was the Court's self-interest charge as to the appellant's testimony prejudicial?

5. Was the Court's charge as to entrapment erroneous?

6. Was the Court's charge as to consideration of uncharged acts prejudicial?

7. Should the judgment of conviction be reversed and vacated?

THE TRIAL

The trial began April 19, 1977, and continued until April 21, 1977, when the jury arrived at a verdict.

The trial was of brief duration covering a familiar conspiracy charge with two alleged sales. The perhaps, unique part of the trial in which appellant offered an entrapment defense is the extent and detail of evidence permitted to be offered as to sales and unrelated narcotic activity not charged in the indictment. Some of the alleged narcotic incidents were contained in a companion indictment, §77Cr.63 which had been referred to a judge other than Judge Tenney, to wit, to United States District Judge Whitman Knapp. After sentencing by Judge Tenney, a motion in the nature of double jeopardy, multiple prosecution, was filed with Judge Knapp. The Government elected to nolle prosequere the companion indictment.

The Government claimed D.E.A. Agent Gordon had seven narcotic transactions with the appellant though only two are charged in the indictment. Evidence of each was presented, over objection, as were alleged conversations of appellant and the undercover officer concerning prior uncharged narcotic activities though

appellant denies such statements and activities. The agent said appellant spoke of narcotic dealings as a subway motorman and when visiting his brother in state prison.

Transactions generally were consumated at appellant's lounge in the Eastern District of New York. The key testimony of the Government was that of Undercover Agent Gordon. Officer Carrol testified as to surveillance of several meetings with the appellant.

The appellant testified about his lack of prior criminal record or activity, prior decorations in military service, ownership of a lounge, and entrapment by the Government agent and the Government informer.

The Government informer did not testify. The Government did not offer any rebuttal testimony or evidence.

ARGUMENTS

POINT ONE

EVIDENCE AS TO UNCHARGED PRIOR AND
SUBSEQUENT NARCOTIC TRANSACTIONS,
ACTIVITIES AND ASSOCIATIONS WERE
CUMULATIVELY PREJUDICIAL AND A NEW
TRIAL SHOULD BE ORDERED.

The trier of the facts, a jury of laymen, could not distinguish the extensive evidence as to the narcotic conspiracy and the two substantive acts charged herein from the numerous, unrelated, uncharged sales and allegations of prior narcotic activity which included appellant's past service as a subway conductor and as a visitor to his brother in state prison. Similarly, there is testimony as to post-conspiracy activity.

Appellant with no prior criminal record was made to appear to have an extensive narcotic background through evidence admitted over objection which was unrelated to the indictment. Though counsel stated in his opening an entrapment defense, the Government was permitted to confuse the jury by presentation of evidence in its direct case of other narcotic activities and transactions. Such was claimed to be permissible to counter the entrapment defense which had not yet been

presented. The defendant had not yet testified or offered any evidence. The Government may have confused the jury as to its duty to consider evidence as to a prima facie case. The Government should have waited for rebuttal to present such evidence. On balance, a jury was probably confused. See the following cases: United States v. Byrd, 352F. 2d 570 (1965, 2d Circ.), United States v. Adams, 385F. 2d 548 (1967, 2d Circ.).

The jury could not have understood that similar transaction evidence might be used to some extent as to disposition but not as to proof of substantive acts -- United States v. Smith, 283F. 2d 760 (1960, 2d Circ.), L. Hand, Circuit Judge. Furthermore, so many similar uncharged acts close to the time of the allegations charged were prejudicial and confusing as to consideration of appellant's disposition in dealing with Agent Gordon. His general or past disposition is irrelevant.

The Government informer was not produced to testify as to prior meetings with the appellant. Not even Agent Gordon could testify completely to inducement or disposition prior to the time the informer introduced the appellant to Agent Gordon. The informant may well have been working on overcoming a negative disposition of appellant to take part. The combination of the Government informant and then the Government agent and

the Government informant together may well have been a truly overbearing set of circumstances, evidence of which the Government should have brought out on rebuttal rather than in its direct case.

Evidence of numerous uncharged narcotic activities may well have been a bloody shirt -- *State v. Goebel*, 36 Wash. 2d 367, 379, 218P 2d 300, 306(1950). The effect in today's times is as a dying accusation of poisoning, *Shepard v. United States*, 290 U.S. 96, 104, 54S. Ct. 22, 78 L. Ed 196 (1933), or a claim of homosexuality, *United States v. Provoo*, 215 F. 2d 531, 537 (1954, 2d Circ.), (See Judge Friendly, *United States v. Leonard*, 524 F. 2d 1076 [1975 2d Circ.]).

The probative value in the Government's direct case of uncharged activities and associations of defendant was prejudicial, *United States v. Simmons*, 503 F. 2d 831, *United States v. Cavallaro*, 553 F. 2d 300 (1977 2d Circ.). The evidence of past activities of appellant to show knowledge and intent was cumulative, as was the testimony of other acts herein -- *United States v. Byrd*, 352 F. 2d 570 (1965, 2d Circ., Judge Anderson).

Traditional balancing of probative value against prejudicial effect, for admission of evidence of prior

and similar uncharged acts, is prejudicial. (See United States v. Simmons, supra, United States v. Cavallaro, supra). The previous transactions and activities of appellant "was totally irrelevant to whether or not he was predisposed to sell illegal firearms (narcotics, in the case herein) before he was solicited by"--the Government informer or agent, United States v. Townsend, 555 F. 2d 152 at p. 161, (1977, 7th Circ. Swygert, C.J., dissenting).

POINT TWO, AND POINT THREE

THE GOVERNMENT DID NOT MEET ITS BURDEN OF
ESTABLISHING DISPOSITION AND OF PROVING
APPELLANT GUILTY BEYOND A REASONABLE DOUBT.

The Government's burden in overcoming an entrapment defense required the Government to call the Government informer to testify in rebuttal. Such Government informer could have testified as to inducement and disposition on the part of the appellant before the series of transactions charged had commenced. His role as to motivation was vital to the Government's case as the Government had the burden to go forward after inducement was shown.

The conclusions of Judge Swygert in his dissent in *United States v. Townsend*, 555 F. 2d 152 (1977, 7th Circ.) are urged upon this Court. Judge Swygert believes the Government is required to come forward with some proof on the issue of entrapment to prove appellant's guilt beyond a reasonable doubt. He says that upon defense testimony putting the predisposition element of entrapment in issue, the amount of Government involvement becomes important and relevant and "the informer's testimony will ordinarily be required for the Government to meet its obligations," *U.S.A. v. Townsend*, supra, 555 F. 2d 152 at p. 165.

In *United States v. Bueno*, 447 F. 2d 903 (1971, 5th Circ.) the Court reversed when the informer had not testified. (See also: *United States v. West*, 511 F. 2d 1083 [3rd Circ. 1975]).

The Government's direct case as to prior conduct of the appellant was out of order, and prejudicial and the lack of the informant's rebuttal testimony meant the Government did not meet its burden as to the disposition of appellant to commit the crime. The Court charged entrapment, leaving it to the jury to decide if the Government had met its burden of showing defendant was not entrapped -- *United States v. Silver*, 457 F. 2d 1217

(1972, 3rd Circ.), United States v. Russell, 411 U. S. 423, 93 S. Ct. 1037, 36 L. Ed. 366 (1973), reaffirming the entrapment test of Sorrells v. United States, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932), Sherman v. United States, 356 U. S. 369, 78 S. Ct. 819, 2 L. Ed. 848 (1958). Hampton v. United States, 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 followed.

The necessity of establishing predisposition is clear and the informer is necessary to establish such. There is no apparent reason he could not have been called to the witness stand by the Government. Without such testimony the Government did not as a matter of law, establish appellant's guilt. It is no answer to say defendant could have called him -- United States v. Tate, 554 F. 2d 1341 (1977, 5th Circ.).

POINT FOUR

THE COURT'S CHARGE AS TO DEFENDANT'S
SELF-INTEREST AS A WITNESS WAS
PREJUDICIAL

The self-interest charge is prejudicial and prior allowance of said charge should be changed. It is especially prejudicial in the case herein where the Court permitted the Government agent to bolster testimony

with mention of the agent's long military and government service record. This contrasted with the prejudicial interest charge and the admission of many alleged incidents of appellant, prior to and after the conspiracy charge in the indictment is on balance very prejudicial. [See United States v. Mahler, 363 F. 2d 673 (1960, 2d Circ.), United States v. Tolkow, 532 F. 2d 853 (2d 1976 2d Circ.).]

POINT FIVE

THE COURT'S CHARGE AS TO ENTRAPMENT
WAS ERRONEOUS.

The Court's charge allowing the jury to decide if there was inducement and avoid consideration of predisposition meant the Court was not deciding a necessary question of law. The Court said, "If you find any credible evidence creating the reasonable possibility that a Government agent or employee instigated or incited or otherwise induced the defendant to commit the crime charged, then the Government must prove beyond a reasonable doubt that such inducement was not the cause or creation of the crime, that is, that the defendant was predisposed and willing to commit the crime" --- (277).

As Judge Godbold stated for the 7th Circuit in United States v. Tate, 554 F. 2d 1341 (1977) (See Pierce v. United States, 414 F. 2d 163 [1969, 5th Circ.]), the sufficiency of defendant's evidence of governmental involvement is a question of law for the Court in the first instance, not for the jury.

Thus, as in the cited case, the jury could decide defendant had not discharged the burden as to inducement and never consider predisposition. Such would impinge on the Court's decision in charging entrapment. The Court decided there was evidence of inducement and charged entrapment. The jury then should consider predisposition as to the transactions charged in the indictment. If the jury did not find inducement it would never get the predisposition, the essential element in entrapment as per United States v. Russell, supra.

The Court in its supplemental instructions (290) left it to the jury as to the implanting inducement and consideration of the dispositional issue. The recent Supreme Court holdings could be frustrated.

POINT SIX

THE COURT'S CHARGE AS TO CONSIDERATION
OF UNCHARGED ACTS IS PREJUDICIAL.

Arguments pertaining hereto are made throughout
the brief, supra, and applied herein.

CONCLUSION

FOR THE ABOVE REASONS, THE
JUDGMENT OF CONVICTION SHOULD
BE REVERSED.

Respectfully submitted,

VICTOR L. BRIZEL,
Attorney for Appellant
79 Madison Avenue
New York, N. Y. 10016
(212) 684-6088

Dated: October 7, 1977

COPY RECEIVED
ROBERT B. FISKE JR.
OCT 7 1977
U. S. ATTORNEY
SO. DIST. OF N. Y.